

**IN THE
Supreme Court of the United States**

October Term 1976

No. 76-322

GENE SLAGLE, INC., ET AL.,
Petitioners,

vs.

GENERAL TELEPHONE COMPANY OF OHIO
and
THE PUBLIC UTILITIES COMMISSION
OF OHIO,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO**

**BRIEF FOR RESPONDENT
GENERAL TELEPHONE COMPANY OF OHIO
IN OPPOSITION**

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STATEMENT OF THE CASE

On April 9, 1970, General Telephone Company of Ohio (General Telephone) filed an application with the Public Utilities Commission of Ohio (the "PUC") for authority to increase its rates. On August 17, 1971, the PUC issued an order authorizing a rate increase, having found that the existing rates were insufficient to provide General Telephone with a reasonable compensation and return. This finding was not challenged by

any of the parties and intervenors. However, General Telephone appealed to the Supreme Court of Ohio on the ground that the rate of return fixed by the PUC was unlawfully low and resulted in confiscatory rates. On June 21, 1972, that court reversed the order of the PUC and remanded the case for compliance with its decision. *General Tel. Co. of Ohio v. Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271, 285 N.E. 2d 34 (Petitioner's Appendix, page 1a). The rates appealed from remained in effect pending the PUC's decision on remand, on September 29, 1972, which authorized the same rates as the August 17, 1971, order.

On September 5, 1973, petitioner Gene Slagle, Inc., purporting to represent all subscribers of General Telephone, filed a complaint with the PUC against General Telephone, alleging that the reversal of the PUC's order of August 17, 1971, voided that rate increase authorized therein, and that General Telephone violated the law of Ohio by continuing to charge such rates. The complaint sought damages in the amount of more than \$6 million, trebled. The PUC granted a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, but on appeal the Supreme Court of Ohio reversed. *Gene Slagle, Inc. v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 44, 322 N.E. 2d 641, cert. den. 423 U.S. 877 (1975) (Petitioner's Appendix, page 9a).

When the complaint was returned to the PUC, General Telephone filed an answer asserting numerous defenses. The PUC, however, by entry of June 10, 1975 (Petitioner's Appendix, page 40a) refused to consider these defenses and issued an entry adverse to General Telephone terminating the proceeding, from which entry General Telephone appealed. While that appeal

was pending, the Supreme Court of Ohio was asked, in another case, to reconsider its holding in *Gene Slagle, Inc., supra*, and on May 5, 1976, overruled that decision. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 105, 346 N.E. 2d 778 (Petitioner's Appendix, page 13a). On the same day the Supreme Court of Ohio reversed the June 10, 1975, entry of the PUC in the instant case, and remanded the cause to the PUC for further proceedings in conformity with its decision in *Cleveland Elec. Illuminating, supra*. *General Telephone Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 124, 346 N.E. 2d 790 (Petitioner's Appendix, page 35a). The petition for a writ of certiorari asks this Court to review the decision of the Supreme Court of Ohio in *General Telephone Co.* (1976).

QUESTION PRESENTED

Does an order of the Supreme Court of Ohio that a pending PUC complaint proceeding be governed by Ohio law as currently construed by the Ohio Supreme Court, rather than by an interpretation of Ohio law favorable to petitioner which has been subsequently overruled, violate due process of law?

ARGUMENT

I.

The Petition Does Not Comply With U.S. Sup. Ct. Rule 23 (f)

U. S. Sup. Ct. Rule 23 (f), 28 U.S.C.A., requires petitioner to specify the stage in the proceedings and the manner in which the federal questions sought to be reviewed were raised. The petition does not comply with this rule. Petitioner did not timely and properly raise any federal question in the proceedings below.

II.

**The Decision Of The Court Below Is Not
A Final Judgment**

The decision of the Court below in the instant case was that "the order of the commission is reversed, and the cause is remanded to the commission for further proceedings in conformity with this court's decision in *Cleveland Elec. Illuminating, supra*." (Petitioner's Appendix, page 38a). A judgment of reversal with directions for further proceedings lacks the requisite finality necessary for review by the United States Supreme Court. *Cincinnati Street R. Co. v. Snell* (1900) 179 U.S. 395.

III.

**Petitioner Seeks Review Of A Decision
Of The Court Below In Another Case**

Petitioner claims on page 6:

"In overruling its initial decision in the instant case, the Ohio Supreme Court would give effect to the PUCO's unlawful order despite the express requirements of the applicable Ohio statute * * *."

The "initial decision" referred to by Petitioner is *Gene Slagle, Inc., supra*, which was overruled by *Cleveland Elec. Illuminating, supra*, not by the decision appealed from. The entire thrust of Petitioner's argument is its disagreement with *Cleveland Elec. Illuminating, supra*, which is not before this Court.

IV.

**Petitioner Has Not Been Deprived Of Any
Property Without Due Process Of Law**

Petitioner bases its argument first on the fact that the Supreme Court of Ohio reversed the August 17,

1971 rate order of the PUC for the reason that the PUC did "not set forth in its order the reasons prompting its decision in sufficient detail," as that Court interpreted the requirements of Ohio Revised Code §4903.09. Petitioner then asserts, on page 6, that the statute was not followed "in a manner which nullified the entire rate-making process". This is simply incorrect. The question of the consequences of the reversal of a PUC rate order was specifically ruled on by the Supreme Court of Ohio in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 105.

In overruling *Gene Slagle, Inc., supra*, and in Part II of its opinion (Petitioner's Appendix, pages 28a and 29a) in *Cleveland Elec. Illuminating Co., supra*, the Supreme Court of Ohio rejected the contention that its reversal of a PUC rate order for failing to comply with the statutory requirements as to the form of an order nullifies the rates filed pursuant to that order. *Accord, Atlantic Coast Line R. Co. v. State of Florida*, 295 U.S. 301 (1935). *Securities & Exchange Comm. v. Chenery Corp.*, 318 U.S. 80 (1943) and *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), cited by Petitioner, are neither in point nor to the contrary. Petitioner's statement that it and other subscribers had to pay "unlawful" charges is not true. It is contrary to the law of Ohio as stated by the Supreme Court of Ohio in *Cleveland Elec. Illuminating Co., supra*.

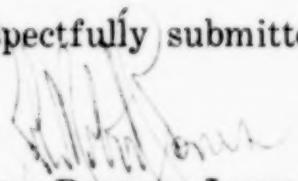
There is nothing to Petitioner's argument that it and other utility customers have been deprived of property without due process of law. Petitioner's legal theory that the reversal of a rate order by operation of law

nullifies rate tariffs on file with the PUC and reinstates prior rates by operation of law was initially accepted by the Court below in *Gene Slagle, Inc., supra*, which was a year later overruled. No "arbitrary or unlawful administrative action" (Petitioner's Brief, page 6) is involved. It is not a violation of due process of law for a State Court to order that a pending proceeding be governed by its latest pronouncement of state law, rather than by a decision which has been overruled.


CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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